KIRO, Inc. *and* American Federation of Television and Radio Artists, Seattle Local. Case 19–CA–21781

July 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

The issues addressed here are whether the judge correctly found that the Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union about the decision to produce a regular news program for broadcast on the channel of an independent television station, failing to bargain with the Union about the effects of that decision on bargaining unit employees, and failing to supply requested information about the news program.[1] The Board has considered the judge's decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order. For the reasons stated below, we find that the Respondent had no statutory obligation to bargain with the Union about the decision to produce a news program; however, we find that the Respondent did violate Section 8(a)(5) by refusing to bargain about the effects of its decision on unit employees and by failing to provide the Union with requested information about the broadcast agreement between the Respondent and the independent station.

I. FACTS

Respondent KIRO, an affiliate of the Columbia Broadcasting System (CBS), operates a television station in Seattle, Washington. The Union represents the Respondent's employees who perform before the microphone or camera. The parties' most recent collective-bargaining agreement expired on January 1, 1992, but they agreed to continue the agreement in effect pending negotiation of a new agreement.[3]

Article XI (management-rights) of the extended collective-bargaining agreement states, in relevant part:

> The management of the business and the direction of the work force, including the right to plan, direct and control station operations; the right to hire, schedule, assign work, retire, demote, suspend, transfer, or discharge; the right to discipline for just cause; the right to judge the competence and ability of employees; the right to determine the means, methods, processes and schedules of production; the right to determine the products to be manufactured or services to be performed; the right to determine whether to make or buy; the right to determine the location of stations and the continuance of any departments; the right to establish production standards in order to maintain efficiency of the employees, are rights belonging to the Company and are not subject to the grievance procedure set forth in this Agreement.

The Respondent and the Union are also signatories to two multiemployer side agreements covering unit employees. The Northwest Regional Code concerns the use of unit employees in television commercials produced by Third Avenue Productions, a division of KIRO. The Network Origination Agreement concerns the distribution to AFTRA-represented artists of fees paid by CBS for rebroadcasting KIRO news programs.

The Respondent uses unit personnel—reporters, anchors, weathercasters, and sportscasters—in the production of several news programs broadcast throughout the day. The number, length, and times of these programs have varied frequently in the past.[4] As of September 1992, the Respondent produced and aired five news programs each weekday: a 2-hour program at 5 a.m., a 1-hour program at 12 noon, a 1-hour program at 5 p.m., a 1-hour program at 7 p.m., and a 1/2-hour program at 11 p.m.

Sometime in 1991, the Respondent decided to produce an additional weekday 1/2-hour news program at 10 p.m. As a network affiliate, the Respondent had to broadcast CBS programming from 10 p.m. to 11 p.m. Consequently, although the 10 p.m. news show would be produced exclusively by KIRO personnel in KIRO's broadcast facility, the Respondent contracted with independent television station KTZZ to transmit the news program on that station's frequency. Prior to the 10 p.m. news on KTZZ, the Respondent had never before produced a regular news program for broadcast over another television station. The practice is relatively new in the industry.

[1] On December 22, 1992, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party and the General Counsel each filed an answering brief to the Respondent's exceptions. The Respondent filed a reply brief to the Charging Party's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and we find no basis for reversing the findings.

[3] Consistent with industry practice, certain economic terms in the parties' contract are expressed as minimums, and the contract provides that unit employees can negotiate personal services contracts for higher wages and benefits directly with the Respondent.

[4] There is no indication in the record whether the parties bargained about any of these programming changes.

The Union first learned of the Respondent's plans from a newspaper article on August 26, 1991.[5] In an August 29 letter to the Respondent, an official of the Union noted the newspaper account and stated: ''I am of course interested and concerned about the various possible impacts such a venture may have on the affected AFTRA represented employees at KIRO.'' Consequently, ''in order to more properly administer'' the parties' contract and ''in order to properly represent all affected'' unit employees, the Union requested the following information:

> 1. Copies of all documentation that exists between KIRO-TV and KTZZ and/or their respective parent corporations pertaining to this joint venture, including, but not limited to, any preliminary or tentative memoranda, letters of intent, and/or letters of understanding.
>
> 2. Copy of the contract between the two stations, including their terms and conditions under which this venture will operate.

The Respondent did not reply to this letter. On September 13, the Union sent the Respondent another letter repeating its information request and stating that it was ''still concerned about the possible impacts upon affected AFTRA represented employees at KIRO.''

On September 16, the Respondent's company newsletter announced that a newscast, entitled ''KTZZ Presents KIRO News at 10 p.m.,'' was expected to premier on September 23. The article stated that the program would be produced live at KIRO and sent by microwave to Channel 22; the producers would be Dave Thomsen and Rose Coulter; and the current KIRO 11 p.m. news anchors, Aaron Brown, Harry Wappler, and Wayne Cody, would also anchor the 10 p.m. news on KTZZ.

By letter dated September 25, the Respondent refused to provide the requested information, asserting that it was confidential and proprietary. The letter also stated that ''the terms of the KIRO-KTZZ agreement do not modify and cannot modify any term of the collective-bargaining agreement between KIRO and AFTRA.''

The 10 p.m. news on KTZZ premiered on September 26. As indicated in the company newsletter, the 11 p.m. news anchor team handled the 10 p.m. segment as well. There is no evidence about the effects of the new production on the terms and conditions of employment of Brown and Cody. Wappler had to work an additional one-half hour each day.

In January 1992, Susan Hutchinson and Gary Justice replaced Brown and Cody on both the 10 and 11 p.m. news. Prior to their reassignment, Justice and Hutchinson had coanchored the 5 and 7 p.m. news. Subsequently, they coanchored the 5, 10, and 11 p.m. news. Justice and Hutchinson have not been required to work increased hours as a result of their reassignment. They have, however, been required to work split shifts. They have also been required to appear on three regular news programs daily. Justice and Hutchinson testified that they had never before appeared on more than two regular news programs daily.

Hutchinson, Justice, and Wappler have each negotiated personal services contracts with the Employer. None of the three has received any additional compensation for appearing on the 10 p.m. news.[6] Hutchinson and Justice credibly testified that the strength of their bargaining position in negotiating personal services contracts is determined, in part, by viewer ratings and audience share for the programs in which they appear. Independent station KTZZ has much lower ratings and market share than network affiliate KIRO. They further testified that the quality of the 10 p.m. news segment was inferior to KIRO's other newscasts. Furthermore, they said that the addition of the 10 p.m. program has affected the quality of the 11 p.m. show, by substantially reducing their preparation time for the later broadcast.

II. ANALYSIS

A. *The Respondent's Obligation to Bargain Over the Decision to Produce the 10 p.m. News*

Contrary to the judge and our dissenting colleague, we do not find that the Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union about the decision to produce the 10 p.m. news for broadcast over station KTZZ. In evaluating the Respondent's obligation to bargain over its decision, the judge gave determinative weight to testimony demonstrating the ultimate effects of the implemented decision on terms and conditions of employment of unit personnel. As stated in the following section of this decision, we agree that the Respondent had an obligation to bargain about these effects; however, not every management decision that affects employees is a mandatory subject of bargaining.

It is well established that Congress has limited the subjects of mandatory bargaining to those ''issues which settle an aspect of the relationship between the employer and the employees.'' *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). There is no obligation to bargain, however, over decisions that focus on matters apart from the employment relationship and that have only ''an indirect or attenuated impact'' on that relationship.

[5] All subsequent dates are in 1991, unless otherwise stated.

[6] The judge found that Hutchinson negotiated an increase in compensation to cover the additional child care expenses which resulted from her reassignment. Hutchinson testified, however, that the increase in her compensation pertained to her appearance on the 11 p.m. news only.

Employers have no obligation to bargain about management decisions that involve, for example, ''choice of advertising and promotion, product type and design, and financing arrangements.'' *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring)).

The Respondent's decision to produce the 10 p.m. news on KTZZ is comparable to the aforementioned management decisions.[7] It involved a choice of product type and method of product distribution.[8] By increasing its presence in the market during prime time, the Respondent hoped to generate a larger share of the viewership of informational programming in the Seattle area. This broadcast programming decision thus focused almost exclusively on the Respondent's relationships with KTZZ, with the Seattle area consumer audience, and, implicitly, with commercial advertisers whose willingness to pay for air time depends at least in part on how many people they think will be watching. These matters are essentially unrelated to the employment relationship, and have only a limited, indirect impact on employment.[9]

Moreover, even in cases involving decisions which focus on concerns apart from the employment relationship but have a more direct impact on employment than the decisions at issue here, the Court has given significant weight to whether the decisional subject matter ''is amenable to resolution through the collective-bargaining process.'' *First National Maintenance*, supra at 678. The Respondent's decision to produce the 10 p.m. news on KTZZ turned on viewer preferences and its broadcast arrangements with CBS. These are matters over which the Union has no control. It is unlikely, therefore, that mandating bargaining over the decision itself would benefit either party to the collective-bargaining relationship.[10] We therefore conclude that the decision was not a mandatory subject of bargaining. The Respondent was free to make that decision unilaterally.[11]

B. *The Respondent's Obligation to Bargain Over the Effects of Producing the 10 p.m. News*

An employer has an obligation to give a union notice and an opportunity to bargain about the effects on unit employees of a managerial decision even if it has no obligation to bargain about the decision itself. *First National Maintenance*, supra, 452 U.S. at 681–682. In this case, the credited evidence shows that the production of the 10 p.m. news on KTZZ resulted in increased hours, increased workloads, split shifts, and greater productivity demands for certain unit employees. In addition, certain unit employees reasonably viewed the new production as affecting their industry reputation and thereby impairing their ability to negotiate personal service contracts, a contractual right secured for them by the Union. Contrary to the Respondent, we find that these changes in working conditions were material, substantial, and significant. Consequently, they were mandatory subjects of bargaining.

The Respondent further contends, however, that the management-rights clause, by which it has reserved the right to ''schedule,'' ''assign work,'' and establish ''production standards,'' constitutes a waiver of the Union's right to bargain over any effects of its decision to produce the 10 p.m. news on KTZZ. We disagree.

It is well settled that a waiver of statutory rights must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In evaluating whether there has been a clear and unmistakable waiver, the Board and courts will look to the precise wording of the relevant contract provisions.[12] Management-rights clauses that are couched in general terms and that make no reference to any particular subject area will not be construed as waivers of statutory bargaining rights. In *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989), for example, the Board found that the reservation in a management-rights clause of an employer's unilateral right to issue, enforce, and change com-

[7] We agree with the judge that, although the decision to broadcast a program on another television station's channel was novel, it did not involve a fundamental change in the scope or direction of the Respondent's enterprise.

[8] The General Counsel has not cited and we are not aware of any Board or court authority finding an obligation to bargain over decisions involving choice of product type or method of distribution.

[9] Our dissenting colleague's argument that the decision is mandatory because of effects on such matters as workload and hours of work would seem to be equally applicable to an employer's decision to accept a big new order or take on a major new customer, either of which could result in overtime or weekend work, a faster workpace, or the hiring of additional employees. Yet it is nearly inconceivable that such decisions could be construed as mandatory subjects of bargaining under the framework established by Supreme Court decisions.

[10] The real benefit to the Union and the unit employees lies in mandatory bargaining about the effects of the Respondent's programming decision. Indeed, we note that the Union's requests for bargaining specifically mentioned only its concern about the ''possible impacts'' of the decision on unit employees, rather than any concern about the decision itself.

[11] The General Counsel argues that the failure to bargain over the decision to produce the 10 p.m. news program was a departure from the parties' past practice of bargaining over the production of programs for entities other than KIRO. The record does not show, however, that the parties have ever bargained over the *decision* to produce news or commercial programming for KIRO or for third parties. The Northwest Regional Code and the Network Origination Agreement concern only the effects of using unit personnel in commercials or in CBS rebroadcasts. Furthermore, even assuming that the parties had bargained about KIRO's decision to make commercials or to provide news programming to the network, such a past practice of voluntary bargaining would not alter the nonmandatory nature of bargaining over this subject. We note that the record does not contain evidence of current industry practice.

[12] *Bancroft-Whitney Co.*, 214 NLRB 57 (1974).

pany rules did not constitute a waiver of the union's right to bargain about the implementation of drug/alcohol testing of current employees, because there was no specific reference in that clause to drug/alcohol testing. Similarly, in *Control Services*, 303 NLRB 481, 483–484 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992), the Board found that the management-rights clause, which reserved to the employer the right to schedule hours of work and to relieve employees of duty, did not grant the employer the unilateral right to reduce employees' hours, because the union did not specifically waive its right to bargain over the *number* of hours employees would work.

The management-rights clause at issue in this case, which reserves to the Employer the right to schedule and assign and to establish production standards, does not make any specific reference to the Employer's right to increase working hours or to increase the workload when changing schedules and assignments. It also makes no specific reference to the effects of lower production standards on the reputation of unit employees and their contractual right to negotiate personal services contracts. Accordingly, we find that it lacks the degree of specificity required to constitute a clear and unmistakable waiver of the Union's right to bargain over these matters.[13]

A waiver may also be inferred from extrinsic evidence of contract negotiations and/or past practice.[14] In this case, the judge correctly emphasized the absence of evidence that the parties discussed the possibility of producing a 10 p.m. news program, to air on another station, during the negotiation of the current agreement. The Union thus could not have ''consciously yielded or clearly and unmistakably waived its interest'' in bargaining about the effects of a decision to produce such a program.[15] Furthermore, there is insufficient evidence about past programming changes to warrant a finding that the parties understood that the Respondent had the unilateral right to make such changes without bargaining about their effects.

In sum, we find that the Respondent has failed to prove that the Union waived its right to bargain about the effects of the lawful decision to produce the 10 p.m. news on KTZZ. We therefore adopt the judge's finding that the Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with notice and an opportunity to bargain prior to instituting these changes.[16]

C. *Request for Information*

We agree with the judge that the Respondent also violated Section 8(a)(5) of the Act by failing to supply the Union with requested information about the business arrangements between the Respondent and KTZZ, but we do not find that this information was presumptively relevant to the Union's collective-bargaining obligation. On its face, information about a commercial transaction between the Respondent and another employer relates to matters outside the bargaining unit. Consequently, the Union bears the burden in the particular circumstances of this case of proving how such information was relevant to its statutory duties. *E. I. duPont de Nemours & Co.*, 268 NLRB 1031 (1984); *Leland Stanford Junior University*, 262 NLRB 136 (1982), enfd. 715 F.2d 473 (9th Cir. 1983).

The Union's burden is to show only a ''probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).[17] In this case, the Union knew that the Respondent planned to initiate an unprecedented regular news broadcast on an independent television station's channel. It reasonably believed that the documents relating to the agreement between KIRO and KTZZ would not only address financial

[13] The Respondent's reliance on *NCR Corp.*, 271 NLRB 1212 (1984), is misplaced. In *NCR*, the Board found that the employer had given notice of its proposed change and that the union had not sought bargaining. The Board then framed the issue as simply whether contractual language prohibited the employer's action in the absence of the union's consent to the change. It was thus treated as a Sec. 8(d) contract modification question rather than—as in this case—a question whether the union had notice and an opportunity to bargain over a change in terms and conditions of employment. Because the right claimed by the union in *NCR* was fundamentally dependent on the contract, the Board was unwilling to find that the employer had acted in bad faith if its interpretation of the contract was as plausible as that of the union. In the present case, however, the General Counsel and the Union contend that the Respondent breached the Union's statutory right to notice and an opportunity to bargain over the effects of a decision on terms and conditions of employment. The contract comes into the case only as the Respondent's defense, i.e., its claim that the Union has contractually surrendered that right. The two issues warrant different analyses for purposes of our determination whether the Respondent's conduct amounts to a refusal to bargain in good faith.

[14] *Litton Microwave Cooking Products v. NLRB*, 868 F.2d 854, 858 (6th Cir. 1989).

[15] *Johnson-Bateman Co.*, supra, 295 NLRB at 186.

[16] We note that certain courts of appeals have faulted the Board's waiver analysis in cases where, in the courts' view, the precise issue was not whether the union waived its bargaining rights concerning a subject but whether, in agreeing to contract terms, the union had exercised its bargaining rights in such a way as to foreclose further bargaining on the subject. See, e.g., *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255 (6th Cir. 1995); *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992). In this case, neither the contract language nor evidence of the parties' negotiations contemplated the possibility of a 10 o'clock news program, its potential effects on unit employees, or the applicability of the general provisions of the management-rights clause to such a change in production. Accordingly, we find that, even under the courts' analysis, the Union did not lose its right to bargain over the termination of the practice. Accord: *Ohio Power Co.*, 317 NLRB 135, 137 fn. 11 (1995).

[17] ''Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant.'' *NLRB v. Yawman & Erbe Mfg.*, 187 F.2d 947, 949 (2d Cir. 1951).

matters but would also discuss substantive details about the content of the 10 p.m. show and the manner in which unit employees would be used in the production of this show. Such information would be clearly relevant to the Union's interests in effects bargaining and in determining whether the new production entailed any breach of the collective-bargaining agreement.[18] Accordingly, we conclude that the Respondent unlawfully refused to provide the information requested by the Union on August 29, 1991.

CONCLUSIONS OF LAW

1. KIRO, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Federation of Television and Radio Artists, Seattle Local is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing timely to notify the Union and to afford it an opportunity to bargain over the effects of the decision to commence the regular production of KIRO news for KTZZ-TV, and by refusing to provide the Union requested information relevant to those effects, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. The Respondent did not commit any other unfair labor practices.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing timely to notify the Union and to afford it an opportunity to bargain over the effects of the lawful decision to commence the regular production of KIRO news for KTZZ-TV, and failing to provide the Union with information relevant to those effects, we shall order the Respondent to bargain, on request, with the Union concerning the effects of the decision on terms and conditions of employment of unit employees, and to make whole any employee who suffered losses resulting from its unlawful conduct with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to furnish all requested information relevant to the effects of its decision.

ORDER

The National Labor Relations Board orders that the Respondent, KIRO, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing timely to notify the Union and to afford it an opportunity to bargain over the effects of the decision to commence the regular production of KIRO news for KTZZ-TV.

(b) Failing and refusing to provide the Union with information relevant to the effects of its decision to commence the regular production of KIRO news for KTZZ-TV so as to enable the Union to discharge its function as statutory representative of the Respondent's employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union concerning the effects of its decision to commence the regular production of KIRO news for KTZZ-TV, and reduce to writing any agreement reached as a result of such bargaining.

(b) Make whole its employees for any losses they may have suffered as a consequence of the Respondent's unlawful refusal to bargain over the effects of its decision.

(c) Furnish the Union, on request, with information requested by it on August 26, 1991, which is relevant to the Union's duties as statutory representative of the Respondent's employees.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of money due under the terms of the Order.

(e) Post at its place of business in Seattle, Washington, copies of the attached notice marked ''Appendix.''[19] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken

[18] Although the Respondent has timely raised the issue of relevance in this proceeding, it did not contest the relevance of the information requested when initially denying the Union's request. Instead, the Respondent claimed that the information was confidential and proprietary and that the KIRO-KTZZ agreement did not modify the collective-bargaining agreement. For the reasons set forth in the judge's decision, we find that the Respondent has failed to prove a valid confidentiality defense. We also agree that the Union had no obligation to accept the Respondent's summary, unsubstantiated claims as a substitute for the information requested.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

CHAIRMAN GOULD, concurring in part, dissenting in part.

Sometime in the summer of 1991, the Respondent, television station KIRO, decided to use its own unit employees in its own studio to produce an additional 1/2-hour news program at 10 p.m. Due to network affiliation commitments, the Respondent contracted with another television station, KTZZ, to transmit the additional news program on KTZZ's channel. It refused to bargain with the Union about the production decision or its effects on unit employees. The Respondent also refused to provide requested information about its business arrangements with KTZZ.

The 10 o'clock news broadcast began on September 26, 1991. Its unilateral implementation had certain undisputed effects on those unit employees. Two coanchors were given split shifts, a weathercaster had to work an additional one-half hour each day, and all unit ''talent'' had their daily preparation time diminished by the additional one-half hour of on-air production.

I concur in finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain about the effects of its decision to produce an additional 1/2-hour news program at 10 p.m. and by failing to provide requested bargaining information. Unlike my colleagues, I would also find that the Respondent unlawfully failed to bargain about the decision itself.

The broadcast decision clearly and directly involves terms and conditions of employment which are subject to the mandatory bargaining obligation of Section 8(d) of the Act. It is a managerial action that focuses almost exclusively on aspects of the relationship between the Respondent and its employees. There is nothing speculative or attenuated about this relationship.

The impact of the new program's production on employees' terms and conditions of employment was direct, substantial, and foreseeable.[1] As stated above, the Respondent's production decision inevitably resulted in changes in unit employees' hours, workloads, shifts, and productivity requirements. Since the decision actually resulted in shift changes for two coanchors and an additional one-half hour of work each day for a weathercaster, the decision constituted a mandatory subject of bargaining. See *Amalgamated Meatcutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (''[W]e think that the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain''). See also *Tuskegee Area Transport System*, 308 NLRB 251 (1992), and cases cited.

Even if the decision here had only resulted in changes in the employees' workloads and productivity requirements, I would still find it to be a mandatory subject of bargaining. Analytically, such changes are not different from changes in shift schedules and hours. Thus, it is clear that the decision here constituted a mandatory subject of bargaining.

My colleagues' contrary view of the Respondent's decisional bargaining obligation stems from a misperception of the significance of the KIRO-KTZZ broadcast arrangement. They emphasize the business relationship between KIRO and KTZZ to find that the decision to produce an additional news program focused on matters apart from the employment relationship and had ''only a limited and indirect impact on that relationship.'' *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981). Consequently, they reason that the decision falls within a category of managerial decisions which do not so involve employees' conditions of employment that the employer must bargain with the employees' exclusive representative about the decision itself. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

The agreement between KIRO and KTZZ may have been essential to the implementation of the managerial decision to produce an additional news program at 10 p.m., but it did not alter the fundamental nature of the decision or shift its focus from the employer-employee relationship to the employer-employer relationship.[2] ''In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, . . . would all seem conditions of one's employment.'' *Fibreboard*, supra at 222 (Stewart, J., concurring). These obvious aspects of unit employees' conditions of employment were central to the Respondent's decision to produce an additional news program. They define the Respondent's bargaining obligation regardless of whether the Respondent broadcasts the program on its

[1] Contrary to the judge, however, I find the alleged ratings effects of the Respondent's decision to be of little significance in determining the Respondent's bargaining obligation.

[2] If the broadcast arrangement were the only managerial decision at issue (for instance, if KIRO and KTZZ had contracted to simulcast or rebroadcast an existing news program), there would quite likely be no obligation to bargain about the decision itself.

own channel or on another television station's channel. I would therefore find that the Respondent had an obligation to bargain with the Union about the decision to produce the additional news program. By failing to bargain, it violated Section 8(a)(5) and (1) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain over the effects of our decision to commence the regular production of KIRO news for KTZZ-TV with American Federation of Television and Radio Artists, Seattle Local (the Union) as the exclusive bargaining representative of employees in the following appropriate unit:

> All employees of KIRO, Inc. engaged to render services as announcers, singers, actors, dancers, or other category of talent who perform before the microphone or camera, both staff and free-lance; excluding technicians, guards and supervisors as defined by the National Labor Relations Act, office employees and persons employed by us as operational coordinators for engineering duties and concurrent off-camera station breaks and announcement, including station sign on and sign off, and all other employees. Instrumental musicians (except when speaking or singing) are excluded.

WE WILL NOT refuse to furnish the Union with information relevant to the effects of the decision to commence the regular production of KIRO news for KTZZ-TV.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union concerning the effects of our decision to commence the regular production of KIRO news for KTZZ-TV, and reduce to writing any agreement reached as a result of such bargaining, and WE WILL make whole our employees for any losses they may have suffered as a consequence of our refusal to bargain over the effects of the decision.

WE WILL, on request, furnish the Union with information relevant to the effects of the decision so as to enable the Union to discharge its function as statutory representative of our employees in the unit described above.

KIRO, INC.

George Hamano, Esq., for the General Counsel.
J. Markham Marshall, Esq. (Preston, Thorgrimson, Shidler, Gates, Ellis), of Seattle, Washington, for the Respondent.
Harold Green, Esq. (MacDonald, Hogue & Bayless), of Seattle, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on June 4 1992,[1] at Seattle, Washington. The charge was filed by American Federation of Television and Radio Artists, Seattle Local (the Charging Party or the Union) on November 5, 1991, against KIRO, Inc. (Respondent or KIRO). On December 30, the Regional Director for Region 19 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act. Specifically, the complaint alleges Respondent unlawfully, unilaterally, and without giving any notice to the Union and affording it an opportunity to bargain, implemented a 1/2-hour news program which is broadcast over an unaffiliated television station, KTZZ-TV, at 10 p.m. and refused to provide the Union with requested information concerning the agreement between KIRO and KTZZ-TV.

Respondent's timely filed answer to the complaint, admits certain allegations, denies others, and denies any wrongdoing.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent's answer to the complaint and stipulations entered in Case 19–CA–21781 admit, and I find, they meet one of the Board's jurisdictional standards and that the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Many of the facts are not in dispute. Respondent and the Union have had a long-term relationship, having entered into various collective-bargaining agreements for more than 20 years. The last collective-bargaining agreement had an expiration date of January 1, 1992. The unrefuted testimony of Anthony Hazapis, the Union's executive director, is the parties agreed to continue the collective-bargaining agreement in effect ''pending negotiation of a new agreement.'' The col-

[1] All dates are in 1991 unless otherwise indicated.

lective-bargaining agreement permits individual unit members to have personal services contracts with Respondent as long as those contracts are more favorable to the unit member than the terms of the collective-bargaining agreement.

Respondent operates a television station and video production facilities in Seattle, Washington. The television station is licensed as Channel 7 and KIRO is an affiliate of Columbia Broadcasting Company (CBS or the network). Respondent has two affiliates, Third Avenue Productions, which produces commercials, and KIRO Direct, a direct mail order business. Respondent admits Human Resources Director Janet Mills and Vice President John Lippman are and have been at all times here relevant, supervisors within the meaning of Section 2(11) of the Act and/or are agents as defined in Section 2(13) of the Act.

Since about 1970, the collective-bargaining agreement also contained schedules describing the ''people covered'' and their minimum salaries. The Charging Party represents two collective-bargaining units of KIRO, ''Television Artists''[2] and ''News Writers.''

KIRO and the Union have also entered into side agreements concerning the ''staff artists,'' one of which is called the ''Northwest Regional Code.'' KIRO's affiliate Third Avenue Productions produces commercials. Mathis Dunn, a national representative for the Union described Third Avenue Productions as ''a division of KIRO, Inc. that produces television/radio commercials, nonbroadcast materials, things of that nature.'' He also described the Northwest Regional Code as ''a code that is negotiated by the Union that specifically covers radio and television commercials in the Northwest region.''

James Johnson, a KIRO senior vice president, responsible for administration and finance, described Third Avenue Productions as ''involved in the video tape and 35 millimeter film production business, video production . . . . for KIRO Television and they produce video for a number of clients, independent clients such as Boeing Company, Ernst and . . . . a variety of retail stores.'' Third Avenue Productions also does ''commercial productions, spot announcements, and they do quite a full service. They're involved in teleconferencing and quite a full service production firm.'' Johnson admitted the products of Third Avenue Productions are not normally regular, ongoing programs like Respondent's KTZZ news regularly broadcast on another station. KTZZ is not affiliated with any of the major networks.

All three network affiliates, KING, KOMO, and KIRO, signed the Northwest Regional Code ''for the purposes of engaging AFTRA members for commercial production. . . . This Agreement applies to the production of television commercials only.'' The commercials produced under the Northwest Regional Code agreement are not produced on a regular basis. This side agreement was in effect prior to 1985 and remains a part of the collective-bargaining agreement between KIRO and the Union.[3]

Respondent and the Union have another side agreement called Network Origination which was in effect prior to 1985–1988.[4] Dunn described the scope of this agreement as:

> With respect to the Network Origination, it deals with news programs or news stories that may be picked up from the network which were shot by local—shot, produced and reported by local KIRO-TV reporters and broadcast on the network. The network would then pay a fee which would be split by the reporter, photographer. In some cases the station may have part of the action.

Dunn believes the news programs produced by Respondent for KTZZ are not covered by any of the side agreements entered into by Respondent and the Union. Respondent did not take issue with Dunn's opinion. Respondent does not claim the side agreements cover the regular production of news programs for KTZZ. Further, Respondent does not refute the Union's representation the Union and KIRO never discussed such programming.

Also unrefuted is Dunn's testimony that the practice of one television station regularly producing a news program for broadcasting on another local television station is a new innovation in the television industry; beginning within the last 2 years. The Network Origination's side letter dated July 30, 1986, provides: ''It is understood and agreed that the Company is not intending to change its present practice of distributing fees received from the CBS Television network to employees covered by the Agreement.'' KIRO also receives news segments from the network which it broadcasts locally.

The collective-bargaining agreement contains the following management-rights clause:

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[2] Specifically, sec. I of the collective-bargaining agreement, entitled ''Minimum Basic Agreement for Television Artists'' provides as here pertinent:

> AFTRA represents that it is and the Company recognizes Aftra as the sole and exclusive bargaining agent with respect to wages, rates of pay, hours of work and other conditions of employment for:
>
> (a) All employees of KIRO, Inc. engaged to render services as announcers, singers, actors, dancers, or other category of talent who perform before the microphone or camera, both staff and free-lance; excluding technicians, guards and supervisors as defined by the National Labor Relations Act, office employees and persons employed by the Company as operational coordinators for announcement, including station sign on and sign off, and all other employees. Including musicians (except when speaking or singing) are excluded.

[3] Dunn explained the evolution of this side agreement, without contradiction or modification, as follows:

> The side line agreement which the three network affiliates have signed on to, with some modifications, came about in 1985 when I started as the executive director of the Seattle local. There was a local problem involving the union membership working for employers without a union contract. The freelance membership of the local, in coordination with the local board, got together and implemented and voted on a rule that would require union membership to work for those employers who have only signed an agreement with the Union. As a result of passing that rule, it was my charge to go out and attempt to get the network affiliates—KING, KOMO, KIRO—to sign on to the Northwest Regional Code for the purposes of engaging AFTRA members for commercial production.

[4] Johnson thought Respondent provided occasional news segments for the Cable News Network (CNN) but deferred to the expertise of Gail Neubert, interim news director at KIRO. Neubert did not mention CNN. Since Johnson admitted he did not have the knowledge to testify about KIRO's preparing or relaying any programming to CNN, I conclude this testimony is not entitled to any weight.

> The management of the business and the direction of the work force, including the right to plan, direct and control station operations; the right to hire, schedule, assign work, retire, demote, suspend, transfer, or discharge; the right to discipline for just cause, the right to judge the competence and ability of employees; the right to determine the means, methods, processes and schedules of production; the right to determine whether to make or buy; the right to determine the location of stations and the continuance of any departments; the right to establish production standards in order to maintain efficiency of the employees, are rights belonging to the Company and are not subject to the grievance procedure set forth in this Agreement.
>
> It is understood, however, that in the exercise of the foregoing functions, the Company shall observe the provisions of this agreement.

This management-rights clause, as Respondent admits on brief, ''originally appeared in the applicable collective-bargaining agreement in approximately 1970.''

B. *The KTZZ Newscasts*

At some undetermined time, KIRO negotiated an agreement with KTZZ to produce a 1/2-hour news program on weekdays which is broadcast at 10 p.m., using KIRO staff and facilities, including transmission equipment. Respondent did not inform the Union of the new programming arrangement with KTZZ. On or about August 26, a newspaper reporter's inquiries was the basis of the Union's learning about KIRO producing the KTZZ news program. On August 29, the Union sent Respondent's vice president, John Lippman, the following letter:

> Both the Seattle Times and the Seattle Post-Inteligencer published articles on Wednesday, Aug. 28, concerning a new business venture between KIRO-TV and KTZZ-TV.
>
> If these articles are correct, i.e., that KIRO will produce a 10:00 p.m. newscast, Monday through Friday, to be broadcast on and for KTZZ television, this may indeed present some significant new opportunities for members of the bargaining unit at KIRO. I am of course also interested and concerned about the various possible impacts such a venture may have on the affected AFTRA represented employees at KIRO.
>
> In order to more properly administer the collective bargaining agreement that exists between AFTRA and KIRO, and in order to properly represent any and all affected AFTRA represented employees at KIRO, I am requesting that you supply me with the following:
>
> 1. Copies of all documentation that exists between KIRO-TV and KTZZ and/or their respective parent corporations pertaining to this joint venture, including, but not limited to, any preliminary or tentative memoranda, letters of intent, and/or letters of understanding.
>
> 2. Copy of the contract between the two stations, including their terms and conditions under which this venture will operate.
>
> I am requesting that you respond, in writing, along with copies of the aforesaid documentation no later than Friday, September 6, 1991.
>
> Of course, I will be more than happy to meet with you personally to discuss this situation anytime at your convenience prior to September 6.

No response was received by September 13, so the Union sent Lippman another letter, which stated, in part:

> On August 29th, I requested copies of all documentation between KIRO-TV and KTZZ-TV relevant to the forthcoming 10:00 p.m. newscast you will produce for Channel 22. (A copy of this letter is enclosed.)
>
> To date, I have had no response from you or your colleagues, even though I requested that the information be supplied to me by September 6.
>
> I realize that recent events at KIRO have undoubtedly consumed a large part of your time. Nevertheless, the 10:00 p.m. newscast will soon be on the air and I am still concerned about the possible impacts upon affected AFTRA represented employees at KIRO.

A newsletter was published by Respondent entitled the KIRONICLE. The September 16 KIRONICLE had a lead article with the headline ''Difficult Decisions Lead to Reductions in Staff.'' The article under the lead had, in quotes, the caption ''KTZZ Presents KIRO news at 10pm'' and announced:

> KIRO-TV is once again breaking ground by being the first ever network station in the Seattle market to provide newscasts for an independent station. Monday, September 23rd, Channel 22 will premier its first newscast entitled, ''KTZZ Present KIRO news at 10pm.''[5]

By letter dated September 25, Respondent's human resources director, Janet Mill, informed the Union as follows:

> In response to your letter of August 29, 1991, we decline to give you copies of contracts between KIRO and entities with which it does business, including KTZZ. KIRO's contractual relationship with KTZZ is confidential and proprietary. As you are aware, the terms of the KIRO-KTZZ agreement do not modify and cannot modify any term of the collective-bargaining agreement between KIRO and AFTRA.

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[5] The article further states:

> The half-hour newscast will be alternately produced by KIRO-TV's Dave Thomsen and Rose Coulter. KIRO-TV's 11pm anchors, Aaron Brown, Harry Wappler and Wayne Cody, will also anchor KTZZ's 10pm show. Each show will be done live in our studios and sent by microwave to Channel 22. At KIROnicle press time, the 10pm format is still being designed. According to Gail Neubert, KIRO-TV Assistant News Director, the style will be similar to KIRO-TV's 7pm newscast. Rehearsals for the show begin this week. Providing news for KTZZ in this fashion is yet another effort by KIRO-TV to be the leading news provider for Western Washington.

At the time this proceeding went to hearing, the anchors for the KTZZ 10 p.m. show and KIRO's 11 p.m. news were Gary Justice, Susan Hutchinson, and Harry Wappler. Wappler is a weathercaster.

C. *Position of the Parties*

Respondent claims the collective-bargaining agreement's management-rights clause exempts Respondent from bargaining about production of the KTZZ news. Respondent also argues if this was a unilateral change, it was not ''material, substantial, and significant.'' *Litton Microwave Cooking Products*, 300 NLRB 324 (1990). KIRO avers the regular production of the KTZZ news did not effect the unit employees' hours, wages, and other terms and conditions of employment. There was no requirement Respondent provide the Union with the requested information, KIRO argues, for it concerned financial data, and the Union must establish the relevance of this kind of information. Respondent argues the Union failed to establish the relevance of the information. On brief, Respondent does not repeat the claim of Mills that the information ''is confidential and proprietary.''

General Counsel and the Charging Party argue the production of the KTZZ news did affect unit employees' terms and conditions of employment and thus bargaining was mandatory. They also claim the collective-bargaining agreement's management-rights clause does not privilege Respondent to unilaterally make such changes in terms and conditions of the unit employees employment. The Charging Party and General Counsel also argue the information requested was relevant.

D. *Discussion and Analysis*

This is not a typical case for, among other factors, the proceeding involves complex contractual relations with several agreements covering the Company's and Union's collective-bargaining relationship. Respondent admitted it did not give the Union notice prior to initiating the production of the KTZZ news and did not give the Union the opportunity to bargain about the effects of implementing the new production. Thus the initial question is whether KIRO had an obligation to inform and then bargain with the Union about the proposed production of the KTZZ news prior to commencing this regular production.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer ''to refuse to bargain collectively with the representatives of his employees.'' Section 8(d) defines collective bargaining as:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

1. Unilateral change

The parties disagree that the KTZZ news production was a mandatory subject of bargaining, whether there was any alteration in wages, hours, and other terms and conditions of employment. As the Court held in *NLRB v. Borg Warner*, 356 U.S. 342 (1957), the duty to bargain in good faith encompassed in Section 8(a)(5) and (d) of the Act is ''limited to those subjects'' specified therein ''and within that area neither party is legally obligated to yield.'' One test announced by the Court in *Borg Warner* is whether it settles a term or condition of employment. Id. at 350.

I find the subject matter of the present dispute involves ''terms and conditions of employment.'' *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). Two of the anchors, Gary Justice and Susan Hutchinson, were reassigned to handle the KTZZ news as well as KIRO's 11 p.m. news program in January 1992. Prior to January, they coanchored the 5 and 7 p.m. news on KIRO. The 5 p.m. news is an hour-long program and the 7 p.m. news is 1/2-hour long. They still coanchor the 5 p.m. KIRO newscast. Before their reassignment, Justice worked from 11:45 a.m. to 7:45 p.m. and Hutchinson was at the station from about 1:30 p.m. to 7:30–7:45 p.m. After their reassignments, they worked split shifts. Hutchinson gets to the station about 2:30 p.m. and finishes her workday about 11:30 p.m.; taking a dinner break from ''approximately 6:30 to 9:00 o'clock.'' Justice works from 1:30 p.m. until approximately 6:45 and from 9 p.m. to midnight. Justice did not receive any added compensation for the change, but Hutchinson negotiated an increase in her personal services contract with Respondent ''to compensate for the increase in child care expense.''

Justice and Hutchinson testified the reassignments had adverse impacts on their performances. Hutchinson explained:

> I think there are four ways that it impacts my performance negatively. One is that it takes a great deal of energy at the end of my day preceding the 11:00 o'clock news, physical and mental energy.
>
> Secondly, it forces me to compete against myself on a program that is not judged—that my success is not judged on and is at a more advantageous hour in that it comes before the 11:00 o'clock news. And I am judged on the 11:00 o'clock news.
>
> It's demoralizing to me because there are no resources put into the program that would be characteristic of the kind of work that we do on our other newscasts. And I had another reason that will have to come to me.
>
> Q. You just stated there are not enough resources put to, I believe, the 10:00 p.m. news. What would be your position concerning the resources put to the 11:00 p.m. news?
>
> A. Well, at 11:00 o'clock we have a producer who is devoted to that program. That person's day is spent producing the half-hour newscast at 11:00. The person who produces the program at 10:00 produces another half-hour earlier in the evening and then, with the help of a writer, puts together the show for the 10:00 o'clock news.
>
> Q. Do you have any examples of incidents that occurred whereby you can reflect on the quality of the 10:00 p.m. news?
>
> A. There are a number that I could mention off the top of my head. If we have a story that we're working on for 11:00, we might not air it at 10:00 o'clock because we want to save it for 11:00. So it is missing a night time version of a story that we would normally cover.

Justice, who is currently the leading male news anchor in the Seattle television market, agreed with Hutchinson that doing the KTZZ news had an adverse impact on his performances on the KIRO 11 p.m. news, testifying:

> Q. Based on your years of experience in the TV news industry, how has doing the 10:00 p.m. news affected your performances on the various news programs you appear on for KIRO-TV?
>
> A. Well, I guess the most real and obvious one is that it comes at a time when normally we would be working on the 11:00 p.m. newscast in terms of editing scripts and coordinating with the producer and the reporters and the writers. And that amount of time that's available to do that is severely cut back. That's the most obvious one.[6]
>
> I guess the more obvious one, now that I think of it, is the fact that I'm anchoring three regular length newscasts now which I've never done before. Two is the most we've ever done on a regular basis, and now I'm anchoring three. So that in itself is I guess an obvious change.
>
> Q. Have there been any incidents that you can refer to whereby you can see the effect the addition of the 10:00 p.m. news had on the news programs that you appeared on?
>
> A. Last night I think is a good example where the producer of the 11:00 p.m. news had attempted to do something different in response to some directions that she had gotten in terms of adding some two-shots and the way she was scripting some things that didn't feel right. And we were in the process trying to get that squared away when it came time to be on the 10:00 o'clock. And by the time we got off of the 10:00 o'clock and got the 11:00 o'clock, we didn't really have the time to complete all of the things I felt needed to be done in order to make the 11:00 o'clock broadcast as good as it could have been and went on the air at 11:00 o'clock, I think, with some things I didn't feel were right or the way they should have been done.

Hutchinson has worked for KIRO for 11-1/2 years, and Justice has been working in television since 1965; commencing work for Respondent in 1972. Justice has been a news anchor for 20 years. While the anchors have been assigned a number of various news programs at KIRO, this is the first time they were assigned to perform for an unaffiliated station on a regular basis. One year they anchored an election night program which ran on three different television stations.

Thus, the evidence demonstrates these unit members' terms and conditions of employment were affected, they were given split shifts, and one was given an increase in wages to cover increased child care costs. Also, Wappler, who has been KIRO's weathercaster from 1969 to 1972, and from 1975 to the present, works one-half hour longer a day because of the assignment to the KTZZ news program. Wappler did not receive any increase in compensation for the additional duties or the additional working time. Justice and Hutchinson both testified they have never previously done three regular new programs daily. Therefore, they were given increased workloads. Inasmuch as the news anchors' reputations are a consideration in their negotiations of their personal services contracts, Justice and Hutchinson felt working for KTZZ, a station they normally would not work for, and the difference in the quality of the KTZZ news production, could adversely affect their bargaining positions when they have to renew their personal services contracts.

All or almost all of KIRO's 7 p.m. news is replicated on the KTZZ news but not on KIRO's 11 p.m. and other news programs. Justice and Hutchinson testified, without convincing refutation, that it takes about 2 hours to adequately prepare a live newscast. Their preparation of the KIRO 11 p.m. news is shortened[7] by the time taken to prepare news spot promotion announcements for and the actual newscast for KTZZ, which adversely affects the quality of the program. Another adverse impact on the unit members, is the fact that unlike their other news programs, Respondent has not assigned one full-time producer to the KTZZ news whose sole responsibility is that program. As Hutchinson testified:

> Well, at 11:00 o'clock we have a producer who is devoted to that program. That person's day is spent producing the half-hour newscast at 11:00. The person who produces the program at 10:00 produces another half-hour earlier in the evening and then, with the help of a writer, puts together the show for the 10:00 o'clock news.

Inasmuch as ratings and standings in the community as anchors affects these unit members' bargaining positions in negotiating personal services contracts, any assignments which adversely impacts on these factors threatens their respective bargaining positions. Respondent gets daily as well as other ratings and share of market information, but failed to introduce any of these factors into evidence. Further, these anchors' performances are rated by Respondent, and these marketing and individual ratings could be and may have been adversely affected by their assignments to do the KTZZ news.

Respondent determined to enter a contract for the production of a regular news program to be broadcast on another television station, including employees services which significantly affected the hours KIRO employees worked, the nature of their workday (split shifts), performing in more regularly scheduled full length news programs, only one of the three anchors received additional compensation, and these employees were not afforded the usual amount of time to prepare for the KTZZ news and the KIRO 11 p.m. news. The lack of usual preparation time and lessened production

[6] Justice, later in his testimony, explained the addition of the KTZZ news assignment negatively affected him because:

> One, it has affected me in that I don't believe I'm putting on as good a program at 11:00 o'clock on Channel 7 as I would be if it were not there. I have no doubt of that. I feel also that the product that I'm putting on at 10:00 o'clock is not a quality product, at least that meets our standards. . . .
>
> THE WITNESS: In the way we produce the 10:00 o'clock and the way it was done prior my coming on board as an anchor to it was that it was going to be a repeat of things that were done earlier and it's done with essentially one producer who produces an earlier newscast without a lot of the kind of effort and adherence to the standards that KIRO news believes in and has traditionally adhered to.

[7] Hutchinson testified she now has 1 hour and 15 minutes to prepare for the KIRO 11 p.m. news.

quality are other factors which may adversely affect their bargaining power in negotiating their personal services contracts. I therefore conclude KIRO's decision to produce KTZZ news substantially affected unit members' terms and conditions of employment.

Gail Neubert, a 14-year employee of Respondent and the interim news director for the past 6 months, testified concerning the changes in KIRO's news programs and the anchor's assignments over the years, but did not dispute the KTZZ news is the first regular news program produced by Respondent for independent television station. In fact, there is no evidence Respondent regularly produces any news programs for any entity other than KIRO. The occasional news segment prepared by KIRO which are broadcast by the network, are based on the import of the news segment prepared by Respondent, and there is no regularity to the number of times the network would chose to broadcast news segments produced by KIRO.

Neubert attempted to refute Hutchinson's testimony concerning the quality of the KTZZ news production by asserting:

> We treat the 10:00 o'clock broadcast just like we treat every other broadcast that we do. It's a KIRO news product whether it airs on our channel or not. The same quality standards exist for that show that exist for every other one we do during the day.

However, Neubert did not give any details to substantiate her claims and the producers of the KTZZ news did not appear and testify. Their absences were unexplained. Further, Neubert admitted, the producer for the 11 o'clock news has the entire day to produce the 11 o'clock news which is not true for the producers of the KTZZ news program. There is a difference in shifts, the 11 o'clock producer works an 8-hour-a-day shift, 5 days a week. There are two producers for KTZZ news; they work 4-day, 10-hour shifts to accommodate doing the 7 o'clock news and the 10 o'clock news broadcasts. They have two shows to produce on those days they produce the KTZZ news. There was no showing Neubert had actual knowledge of how the KTZZ news producers handled script writing or other production details.

I find Justice's and Hutchinson's detailed renditions of the methods used to produce the KTZZ news the more credible versions. Their descriptions of the daily production of the KTZZ news were accomplished with considerably persuasive detail, they gave the strong impression they were making honest attempts to accurately recall the facts. I was impressed with their demeanor which strongly tended to give their testimony credence. Justice and Hutchinson both testified pursuant to a subpoena and indicated they felt strong loyalty to Respondent, but gave the convincing impression they were making honest attempts to accurately recall the facts. Also considered are inherent probabilities and the fact these witnesses currently work for Respondent and are subject to Respondent's economic will, thus their testimony is less likely to be false. *Shop-Rite Supermarket*, 231 NLRB 500 (1977). Accordingly, I credit the testimony of Justice and Hutchinson, and where Johnson's and Neubert's testimony is contrary to their testimony, I credit the testimony of Justice and Hutchinson.

As the Court stated in *Fibreboard Corp. v. NLRB*, supra, 379 NLRB at 211:

> One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42–43. To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.
>
> The conclusion that ''contracting out'' is a statutory subject of collective bargaining is further reinforced by industrial practices in this country. While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining. *Labor Board v. American Nat. Ins. Co.*, 343 U.S. 395, 408. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. . . .
>
> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

I have determined above, the subject matter of this dispute, the contracting by Respondent to produce the KTZZ news using KIRO facilities and personnel who were unit members and who, as a result of this decision, experienced substantial changes in the terms and conditions of their employment, establishes Respondent had an obligation to inform and bargain with the Union prior to implementing these changes in unit members' terms and conditions of employment.

The bargaining history of the Seattle, Washington area television industry, as reflected in the collective-bargaining agreements placed in evidence, clearly demonstrates Respondent and the Union negotiated concerning the terms and conditions unit members perform work for third parties, network feeds and companies that produce commercials when using unit members for work not produced by and/or for KIRO and the other signatory television stations. Thus, I conclude Respondent and the Union have successfully negotiated collective-bargaining agreements concerning productions for or on behalf of persons other than KIRO. The production of KTZZ news was not shown to change Respondent's basic operation. The KTZZ news is produced at

KIRO's facilities and there is no claim Respondent contemplated making a capital investment because of the KTZZ news production. Thus, save for the management-rights clause, discussed below, Respondent has not shown its freedom to manage its business would be abridged significantly or in a manner differently than already obtained in the previously discussed side agreements.

As found in *Soule Glass & Glazing Co.*, 652 F.2d 1055, 1084 (1st Cir. 1981):

> In general, an employer's ''unilateral action'' with respect to mandatory subjects of collective bargaining under a collective-bargaining agreement is considered an unlawful refusal to bargain. ''[A]n employer's unilateral change in conditions of employment under negotiation is . . . a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.'' *NLRB v. Katz*, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962). . . .
>
> In *NLRB v. W. R. Grace & Co.*, 571 F.2d 279, 282 (5th Cir. 1978), the court stated:
>
> > It is well-settled that an employer violates its duty to bargain collectively when it institutes changes in employment conditions without first consulting the union. . . . [However,] [t]he employer's power to alter working conditions in the nature of his plant is not contingent upon union agreement with his proposed change. The company has only to notify the union before effecting the change so as to give the union a meaningful chance to offer counter-proposals and counter-arguments. (emphasis added, citations omitted)
>
> In *Grace*, which involved the company's decision to discontinue a product for economic reasons, with layoffs and elimination of a shift, the court held: ''The failure to notify or refusal to bargain with the union over the effects of management decisions to limit production or otherwise alter operations violates Section 8(a)(5) of the Act. Id. at 283.
>
> Good faith bargaining requires timely notice and meaningful opportunity to bargain regarding the employer's proposed changes in working conditions, since '''[n]o genuine bargaining . . . can be conducted where [the] decision has already been made and implemented.''' *Ladies Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972). Thus, ''[n]otice of a fait accompli,'' regarding a matter as to which the employer is obligated to bargain to impasse, violated Section 8(a)(5). Id; see *Metromedia, Inc., KMBC-TV v. NLRB*, 586 F.2d 1182, 1189 (8th Cir. 1978).

The court in the *Soule Glass* case, id. at 1084–1085, also listed some contexts where an employer's ''unilateral'' actions ordinarily will not violate Section 8(a)(5).

> These situations include unilateral actions where: (1) they relate to matters outside the mandatory subjects, such as the wages of nonunit, nonunion employees, *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171–78, 92 S.Ct. 383, 393–97, 30 L.Ed.2d 341 (1971) (collective bargaining obligation under Section 8(d) extends only to ''terms and conditions of employment'' of employees in appropriate bargaining unit); (2) the employer has bargained in good faith to impasse on the issue, e.g., *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963); (3) the changes merely preserve the ''dynamic status quo,'' consistently with past policies and practices, see R. Gorman, supra, at 450–454; (4) the union has made a ''clear and unmistakable waiver'' of its right to bargain on the issue, e.g., *Metromedia*, supra, 586 F.2d at 1189; R. Gorman, supra, 466–69; and (5) the actions concern certain major business decisions involving fundamental changes in the scope, nature, or mode of operation of the business, or the commitment of investment capital, see *Machinists & Aerospace Workers v. Northeast Airlines, Inc.*, 473 F.2d 549, 557 (1st Cir.) cert. denied, 409 U.S. 845 (1972) (no duty to bargain regarding merger); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268-69 . . . (closing entire business not unfair labor practice; ''some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of Section 8(a)(1)'') see generally R. Gorman, supra, at 443–445. . . .
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> Thus, there is an important distinction between the duty to bargain about a particular business decision affecting unit employees and the duty to bargain about the decision's effects on the unit employees; a distinction which at times is difficult to draw.

While this is not a subcontracting case, these principals are applicable. I conclude, for the previously stated reasons, since Respondent's decision ''did not alter [its] basic operation . . . to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.'' *Fibreboard*, supra, 379 U.S. 203. Moreover, Respondent's decision was not a major business decision which fundamentally changed the scope, nature or mode of operating KIRO-TV. There is no evidence KIRO previously refused to bargain with the Union on productions for entities other than KIRO. Compare *Ford Motor Co. v. NLRB*, supra, 441 U.S. 488, 492 (1979).[8]

As previously noted, Respondent has prepared material for other customers, either commercials through its affiliate Third Avenue Productions, or for its affiliated network and in both of these cases, it negotiated with the Union concerning the terms and conditions of unit employees' participation and compensation. The traditions of the industry are an integral and important factor in determining ''[t]he appropriate scope of collective bargaining.'' Id. at fn. 8. Respondent has failed to adequately differentiate the production of KTZZ news from these other productions to now claim it was a business decision which was fundamentally different from the other productions or otherwise exempt this mandatory matter from the bargaining obligation imposed by Section 8(a)(5) and (d) of the Act.

[8] Here, as in the *Ford Motor Co.* case, Respondent had and retained control over the terms of the contract with KTZZ and other entities for whom it produced programs, news segments and commercials, thus KIRO could engage in meaningful bargaining with the Union.

There is no claim Respondent implemented the production of KTZZ news because of an emergency and there is no other exculpatory operating exigency to excuse or justify Respondent's unilateral action. Further, there is no claim and no probative evidence the decision to contract with KTZZ was solely or principally motivated by economic considerations for the terms of the contract to produce the KTZZ news and the ramifications of the agreement were not adduced in this proceeding. Neubert gave the Respondent's motive for inaugurating the arrangement with KTZZ news as follows:

> Our strategy for news and information programming is to, your know, become the premiere source in our market area. And that means adding programming where we can and being the place with the most news broadcasts. And 10:00 o'clock was the time period that we wanted to get into that wasn't available to us on our own station.[9]

The ultimate goal of this strategy to ''become the premiere source'' was not detailed on the record; there were no projections of anticipated revenues, market share, impact on other ratings, etc., to determine the basics of Respondent's plan or many of the anticipated impacts on Respondent and the employees represented by Charging Party. The only effects of the production of the KTZZ news adduced were those detailed by the unit members Justice, Hutchinson, and Wappler and found herein to be demonstrably adverse to their interests and/or significant changes in their terms and conditions of employment. The assignment to the KTZZ news production was not just another change in assignments for these represented employees, they were assignments to participate in regular programming which was broadcast only over an independent television station, a station that did not have a comparable reputation for quality news broadcasts.

Moreover, the record clearly demonstrated that the implementation of the production of the KTZZ news was not consistent with Respondent's traditional methods of conducting its business operation for it was admitted this was the first time KIRO agreed to produce a news program on a regular basis to be broadcast on another unaffiliated television station. Respondent's action ''involved a departure from previously established operating practices, effected a change in conditions of employment, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit.'' *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, 1576 (1965). The assignment of unit members to the KTZZ news production has been shown to have had a significant impact on unit employees' job interests and is a change in the matters Respondent usually negotiates with the Union, in violation of Section 8(a)(5) and (1) of the Act.

Assuming arguendo, Respondent only had to bargain about the effects of its decision, the record is clear Respondent never notified the Union about its plans to produce KTZZ news with KIRO staff at KIRO's facilities and the Union learned of the permanent assignment of union members to the production of the KTZZ news after the decision to produce the program was implemented. The Union was presented with a fait accompli. Thus the Union was not given the opportunity to bargain with Respondent over the effects of the decision to produce KTZZ news on unit employees before implementing the change. The failure of Respondent to afford the Union an opportunity to bargain with respect to the effects of this decision before implementing the changes violates Section 8(a)(5) and (1) of the Act.

[9] Respondent was obligated to broadcast network programming on KIRO at 10 p.m. and thus sought another outlet, which resulted in the KTZZ news.

2. Contractual waiver

Respondent claims it was acting within the management-rights clause of the collective-bargaining agreement when it contracted with KTZZ and assigned unit members to the KTZZ news production. Initially, I find this argument unpersuasive since the terms and conditions of the KIRO-KTZZ news agreement were not presented on the record and there was no testimony from anyone claiming to be privy to and directly involved in the decision making process leading to the KTZZ news and/or the negotiation of the KIRO-KTZZ news contract. Respondent's bare, unsubstantiated claim the KTZZ news was merely another news broadcast of KIRO is an affirmative defense that was not supported by any evidence of record.

Further, assuming arguendo, Respondent is correct and the KTZZ news program is merely just another KIRO production like those it added to its own broadcasting schedule, Respondent has historically negotiated with the Union concerning other stations or industries using KIRO productions, as reflected in the side agreements to the collective-bargaining agreement. The side agreements establish such productions were not included in the management-rights clause. I note Respondent has failed to present any of the bargaining history of the collective-bargaining agreement to support the assertion of knowledgeable waiver.

The management-rights clause does refer to the location of Respondent's stations, but there is no collective-bargaining history which indicates the Union and Respondent understood this provision to include the broadcasting of covered employees work on stations other than KIRO rather than the geographical location of Respondent's station. Thus, the record fails to support KIRO's claim of a clear and unmistakable waiver or bargaining away of any statutory rights. *Press Co.*, supra.

To determine if the Union has waived its right to demand bargaining on the subject of the KTZZ news production, the intent and understanding of the parties when they negotiated the management-rights clause in the collective-bargaining agreement must be established. In *Beacon Piece Dyeing Co.*, 121 NLRB 953 (1958), the Board determined:

> [A]though the Board has . . . held repeatedly that statutory rights may be ''waived'' by collective bargaining, it has also said that such a waiver ''will not readily be inferred'' and that there must be ''a clear and unmistakable showing'' that the waiver occurred. The primary issue in this case, therefore, is whether the Union ''clearly and unmistakable'' waived or ''bargained away'' its statutory rights to bargaining on an increased workload and a general wage increase therefor.

Further, the Board held in *Press Co.*, 121 NLRB 976 (1958):

> It is well established Board precedent that, although a subject has been discussed in precontract negotiations and has not been specifically covered in the resulting contract, the employer violated Section 8(a)(5) of the Act if during the contract term he refuses to bargain, or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was ''fully discussed'' or ''consciously explored'' and the union ''consciously yielded'' or clearly and unmistakably waived its interest in the matter.

Cf. *Dubuque Packing Co.*, 303 NLRB 386 (1991); *Johnson-Bateman Co.*, 295 NLRB 180 (1989).

Applying these dictates, I find there can be no waiver construed from the management-rights clause for Respondent admits in its newspaper article it was ''breaking ground by being the first ever network station in the Seattle market to provide newscasts [sic] for an independent station.'' The record clearly demonstrates the bargaining history of the parties did not contain or contemplate the issue of the terms and conditions of unit members employment when they are used in the production of shows to be broadcast on independent stations. Therefore, the subject of such a production could not have been ''fully discussed'' or ''consciously explored'' nor can it be found the Union ''consciously yielded'' or clearly and unmistakably waived its interest in the matter. *Press Co.*, supra.

Even if the management-rights clause contained in the collective-bargaining agreement is found to be very broad the Board has consistently held new matters are not encompassed in the management-rights clause. *LeRoy Machine Co.*, 147 NLRB 1431 (1964); *Proctor Mfg. Corp.*, 131 NLRB 1166 (1961); *Dubuque Packing Co.*, supra. There is no evidence the parties bargained over the issue of Respondent regularly producing programs for broadcast on an independent station and such activity by management is not specifically mentioned in the management-rights clause. As determined above, the history of bargaining demonstrates the opposite, the parties negotiated about the terms and conditions of unit members employment when they were involved in the production of shows, news segments picked up by the network or other stations and commercials produced for entities other than Respondent. Thus, the Union has historically required Respondent to bargain about its decision involving productions for a broadcast on other stations.

Respondent has not demonstrated it has previously unilaterally produced any programs for regular broadcast on an independent station and that the Union agreed KIRO had the right to do so. Assuming Respondent demonstrated a prior failure of the Union to challenge any such prior productions, such as the one-time election broadcast, as held in *Johnson-Batemen*, supra at 188, the Union's past acquiescence to the Employer's unilateral action does not ''constitute a waiver of the union's right to bargain about the employer's subsequent unilateral'' actions concerning the same subject.

3. Conclusion

In light of the above findings and considerations, I conclude the terms and conditions of unit members' employment while they are assigned to regular productions to be broadcast over independent television stations is a mandatory subject of bargaining; that the Union has not waived its right to bargain with Respondent about this subject; and that Respondent's unilateral assignment of employees to such productions substantially affecting their terms and conditions of employment, without providing the Union prior notice and an opportunity to bargain, violated Section 8(a)(5) and (1) of the Act, as alleged.

4. Information

As the Court noted in *Florida Steel Corp. v. NLRB*, 601 F.2d 125, 129–130 (4th Cir. 1979):

> Section 8(a)(5) of the Act imposes on an employer a broad duty to furnish relevant information to its employees' bargaining agent. This duty is rooted in recognition that union access to such information can often prevent conflicts which hamper collective bargaining. Cf. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438–39, 87 S.Ct. 565 (1967). The standard of relevancy is considerably less stringent than that applicable to adjudicative proceedings. In the words of the Supreme Court, it is a ''discovery-type standard'' rather than a trial standard. Information must ordinarily be furnished if there is a ''probability'' that it is relevant. See 385 U.S. at 437. . . .
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> The ''discovery'' standard of relevancy applies precisely because the union cannot decide what role it will seek to play until it obtains concrete, adequate information. . . .
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> As Professor Gorman has pointed out . . . ''in order that the union be deemed to waive its statutory right to information, its relinquishment of the right must be knowing, clear and unequivocal.'' Basic Text on Labor Law: Unionization and Collective Bargaining 418 (1976). The record contains no substantial evidence of waiver. The union steadfastly insisted on its right to receive the information. . . .
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> Regardless of whether the company acted in bad faith, its unilateral change in working conditions deprived the union of an effective opportunity to bargain. Accordingly, it violated the Act. See *NLRB v. Katz*, 369 U.S. 736 (1962).

I find Respondent's claim in its letter to the Union that the information is confidential and privileged to be without merit. Having found the subject of the information related to terms and conditions of employment, it is presumptively relevant for it is ''data requested in order to properly administer and police a collective-bargaining agreement as well as to requests advanced to facilitate the negotiation of such contracts.'' *Chemical Workers Local 6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983). See also *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310 (8th Cir. 1979).[10]

[10] See also *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1092–1093 (1st Cir. 1981), holding:

> The general rule is that an employer must supply, on request, ''relevant Information'' ''in the employer's possession'' ''needed by a labor union for the proper performance of its duties as the employees' bargaining representative,'' *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); i.e., ''to enable the [union] to understand and intelligently discuss the issues raised in bar-

Continued

The Board observed in *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984):

> [A]n employer must provide a union with requested information ''if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative.'' *Associated General Contractors of California*, 242 NLRB 891, 893, enfd. 633 F.2d 766 (9th Cir. 1980); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

As held in *Proctor & Gamble Mfg. Co. v. NLRB*, supra at 1315, ''Information pertaining to the wages, hours and working conditions of employees in the bargaining unit is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant.'' Thus Respondent has the burden of proving its irrelevance. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977). The burden on the employer, as described in *Soule Glass*, supra, 652 F.2d at 1093:

> Where the requested information concerns wages and related information for employees in the bargaining unit, the information is presumptively relevant to bargainable issues. *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969). Unless the employer comes forward with an effective rebuttal as to lack of relevance or ''provide[s] adequate reasons why he cannot, in good faith, supply the information,'' *NLRB v. Borden, Inc.*, 600 F.2d 313, 317 (1st Cir. 1979), the union need make no showing of relevance. *Curtiss-Wright Corp. v. NLRB* 347 F.2d 61, 69 (3d Cir. 1965). See *Boston Herald-Traveler Corp. v. NLRB*, 223 F.2d 58, 63 (1st Cir. 1955) (disclosure required ''without regard to its immediate relationship to the negotiation or administration of the collective-bargaining agreement''). Furthermore, the company is obligated to make a ''reasonable diligent effort'' to obtain such relevant information, and absent some valid justification must provide all of the relevant data requested. *Borden*, supra, at 318.

The right to disclosure is not without limits and the employer's obligation to provide such information is not unlimited. The court found in *Soule*, supra at 1094:

> Under certain narrow circumstances, an employer may be excused from providing requested information presumed or shown to be relevant. When the employer has a good faith claim of undue burden, legitimate business needs for confidentiality or justifiable fear of violence or harassment of employees, disclosure generally will not be required. *Western Massachusetts Electric Co.*, 589 F.2d at 47. R. Gorman, supra, at 415–18. In such cases, the court will weigh the competing interests of the employer and the union in the requested information, and the type and extent of disclosure required will depend on ''the circumstances of the particular case.'' *Detroit Edison*, supra, 440 U.S. at 314–315 (refusing to require unconditional disclosure to union of employee psychological aptitude test where employer had reasonable confidentiality concern). For example, a union is not entitled to even clearly relevant information ''in the precise form demanded,'' where this would entail undue burden. *Emeryville Research Center v. NLRB*, 441 F.2d 880, 887 (9th Cir. 1971).
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> In *Emeryville*, the union requested salary grade curves, individual salaries, and merit ratings for 430 unit professional employees to enable the union ''to bargain intelligently.'' The court held that
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> > [W]here, as here, the Company raises bona fide objections [i.e., burdensomeness and confidentiality of competitors' salary data] to the form in which information is requested and offers to provide information sufficient to meet the Union's needs in a mutually satisfactory form, the Union must do more than rely on general avowals of relevance in order to establish its right to the information. It must state the uses to which the information is to be put so that the company is afforded the opportunity to provide it on mutually satisfactory terms. . . . Once the Union has done so, a Company refusal to provide information adequate to meet the Union's needs within a reasonable time would support and unfair labor practice charge. . . .
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> 441 F.2d 885. The court held that ''resort to the Board is premature'' where the company offered to accommodate the union's need and the union refused to cooperate in the above manner. Id. at 886. See *Shell Oil Co. v. NLRB*, 457 F.2d 615, 619–20 (9th Cir. 1972) (citing *Emeryville*, supra). In addition, ''[t]he employer may also defend against disclosure by demonstrating that there is a clear and present danger that the union will use the information to incite violence or harassment of employees.'' R. Gorman, supra, at 416. . . . [T]he union could give no assurance that the [information] would be kept confidential.

In the instant case, there was no offer by KIRO to provide any information or otherwise meet the Union's concerns in pursuing their representational obligations on behalf of unit members in Respondent's employ. The Company did not offer to accommodate the Union in any manner and there is no evidence of lack of union cooperation. Also, Respondent failed to explain or demonstrate there is a danger the Union would disclose the information to others to the detriment of Respondent. There was no claim by Respondent the Union could not be trusted to keep the information confidential or there were no means of providing some of the information without compromising necessary confidentiality. KIRO did not propose any alternatives to meet the Union's request yet

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gaining. . . .'' *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 868 (9th Cir. 1977). See R. Gorman, supra, at 409. Absent special circumstances, see *Western Massachusetts Electric Co. v. NLRB*, 589 F.2d 42, 47 (1st Cir. 1978), ''relevance'' is determinative of the duty to disclose. Relevance is to be determined by a liberal ''discovery-type standard.'' *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). As the Supreme Court noted in the leading case of *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153–54 (1956), ''[e]ach case must turn on its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.''

protect the claimed confidentiality of the agreement with KTZZ news. In this case, the Respondent did not establish ''a legitimate, good faith objection on grounds of burdensomeness or otherwise, and offers to cooperate with the union in reaching a mutually acceptable accommodation.'' *Soule*, supra, 652 F.2d at 1098.

The Union explained in its letter to KIRO the request for information related to the administration of the collective-bargaining agreement between the Union and Respondent, specifically the potential of adverse impacts upon represented employees. ''The Union had a statutory obligation to enforce all of their rights under that contract.'' *Magnet Coal, Inc.*, 307 NLRB 444, 445 (1992). Since the terms and conditions of employment or other contractual concerns are or could be altered by the KIRO-KTZZ agreement, the requested information ''had sufficient probable and potential relevance here.'' *Maben Energy Corp.*, 295 NLRB 149 (1989). Further, the information requested would be highly relevant to any effects bargaining. *Emeryville Research*, 441 F.2d 880 (9th Cir. 1971); *Air Express International Corp.*, 245 NLRB 478, 500–501 (1979).

KIRO's response was the ''KIRO-KTZZ agreement [does] not modify and cannot modify any term of the collective-bargaining agreement between KIRO and AFTRA.'' This blanket claim by one party to the agreement does not clearly address the Union's complete request.[11] There was no demonstration by Respondent either in its communications with the Union or during this proceeding that the requested information was in fact irrelevant or confidential.[12] Thus, Respondent has failed to demonstrate the need for confidentiality concerning any or all the requested information outweighs the Union's representational interests. Nor has Respondent demonstrated that production of the information would be unduly burdensome or injurious. ''[S]ubstantiation of the company's position requires no more than 'reasonable proof.''' *Truitt*, id. at 151.

Respondent's claim the information concerned financial data which was subject to the limitations of the *Truitt* has not been substantiated by any proof. There was no proffer concerning the specific contents of the requested information. Further, there was no evidence any or all the requested information was ''financial information.'' To accede to this bare claim could permit companies to avoid many of their obligations under Section 8(a)(5) of the Act to supply relevant information by the mere device of making the unsupported claim it was ''financial information.''[13]

Respondent has similarly argued the requested information ''does not relate to 'the core of the employer-employee relationship' and therefore is not 'presumptively relevant.''' Again, since the contents of the requested documents were not even provided or described in the most superficial manner, and there has been a past history of bargaining over at least some of the terms and conditions of employment of unit members performing work for Respondent which is to be broadcast and/or utilized by parties other than Respondent, this argument is also found to be without merit under the facts of this case. For the reasons contained herein, I conclude the requested information is presumptively relevant.

At the least the Union had the right to request information to insure the production of KTZZ news was in accordance with the collective-bargaining agreement. As held in *Consolidation Coal Co.*, 307 NLRB 69, 70 (1992):

> In *Maben Energy Corp.* [295 NLRB 149 (1989)], the Board found that the Union's showing amply demonstrated probable and potential relevance of the requested information in fulfilling its statutory representative duties. The union, as here, requested specific information from respondent employer in order ''to effectively administer and monitor important contractual rights and obligations. . . . because the information could impact on important contractual rights including seniority, panel and recall, and job security bidding rights.''

As determined above, the Union was seeking information which could impact on union members' contractual rights, including terms and conditions of employment such as hours of work, repercussions upon unit members' bargaining positions in negotiating personal service contracts, etc. The Union also has a right to the information to determine whether the issue of producing news programs for nonunion companies should be addressed in a grievance or elsewhere. As held in *Brisco Sheet Metal*, 307 NLRB 361 (1992), ''The Union was entitled to the requested information to determine the nature of the relationship between the companies and to determine whether the Respondent was committing unfair labor practices by unilaterally changing the terms and conditions of employment of its unit employees.'' Once the Union established these reasons for the requested information, the Union was entitled to the information.

I find the Union has demonstrated the requested information was relevant and a reasonable attempt to meet its obligations to its members as their collective-bargaining representative. Respondent failed to justify its blanket refusal to supply any of the information without establishing the Union would abuse the need for confidentiality or that at least some of the

[11] As noted above, the Union requested ''[c]opies of all documentation that exists between KIRO-TV and KTZZ-TV and/or their respective parent corporations pertaining to this joint venture . . .'' and a ''[c]opy of the contract between the two stations, including terms and conditions under which this venture will operate.''

[12] Respondent has also failed to demonstrate the information requested was economic information of the nature governed by the requirements the Court set in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). If Respondent's position is the request is for information of the nature governed by *Truitt*, then KIRO's claim the agreements with KTZZ-TV or affiliates do not change the collective-bargaining agreement raises the right for the Union to substantiate Respondent's claim. Respondent never produced any evidence to substantiate this claim of no change to the collective-bargaining agreement and in its letter clearly informed the Union any request for such substantiation would be a futility for there was no circumstance presented where Respondent indicated it would modify its refusal to provide the requested information.

[13] The cases cited by Respondent in support of their argument are not persuasive. For example, *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984), involved a situation where the requested information was without dispute profit data or other financial data. Further, the Board held the Union had to ''show a specific need for the information in each particular case.'' If the information in this instant case were deemed financial, the Union had shown a specific need, administration of the collective-bargaining agreement with attendant side agreements and potential adverse effects upon unit members.

requested material could not be presented in a form that preserved confidentiality. Respondent proposed no conditions to the Union and failed to assert a substantial justification for its blanket refusal to provide any information. ''The party asserting the need for the limitation or condition has the burden of proof on that question.'' *R.E.C. Corp.*, 307 NLRB 330, 331 (1992); citing *Washington Gas Light Co.*, 273 NLRB 116, 117 (1984); *Boise Cascade Co.*, 279 NLRB 422, 431 (1986); *McDonnell Douglas Corp.*, 224 NLRB 881, 890 (1976). I therefore conclude by failing and refusing to provide the Union any of the requested information, Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent KIRO, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. American Federation of Television and Radio Artists, Seattle Local is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material the Union has been the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act for the following appropriate unit, as here pertinent:

> All employees of KIRO, Inc. engaged to render services as announcers, singers, actors, dancers, or other category of talent who perform before the microphone or camera, both staff and free-lance; excluding technicians, guards and supervisors as defined by the National Labor Relations Act, office employees and persons employed by the Company as operational coordinators for announcement, including station sign on and sign off, and all other employees. Including musicians (except when speaking or singing) are excluded.

4. At all times material herein, the Union has been the exclusive collective-bargaining representative of all the employees in the unit found appropriate in Conclusion of Law 3 for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. By failing and refusing to bargain in good faith with the Union by unilaterally changing employees' terms and conditions by implementing its decision to produce a regular news broadcast for another company, KTZZ, using unit members, without timely notification to the Union and without affording the Union an opportunity to bargain over the decision, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing to timely notify the Union and afford it an opportunity to bargain over the effects of the decision to commence the regular production of KTZZ news for KTZZ-TV, Respondent violated Section 8(a)(5) and (1) of the Act.

7. By failing and refusing to furnish the Union with certain information requested by it in letters dated August 29 and September 13, 1991, Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

8. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Employer has engaged in unfair labor practices proscribed by Section 8(a)(1) and (5) of the Act, I recommend that it cease and desist therefrom, and that it take certain affirmative action designed to remedy the unfair labor practices and to effectuate the policies of the Act.

Having found Respondent has unlawfully made unilateral changes in the employees' terms and conditions of employment, I shall recommend that Respondent, on the Union's request, be ordered to restore the status quo ante and that Respondent be ordered to cease and desist from implementing unilateral changes in terms and conditions of employment of unit employees without first notifying and bargaining with the Union which represents them. Also, I shall recommend that Respondent, on the Union's request, be ordered to cease and desist from implementing unilateral changes in terms and conditions of employment of unit employees without first bargaining with the Union which represents them. By its unlawful conduct, the Company, to a significant extent, deprived the employees of the benefit of representation by a certified union, and deprived the Union of the benefit of such certification. I further recommend Respondent make whole any employee prejudiced by their unilateral action, the exact amounts, if any, to be determined at the compliance stage of this proceeding and to post the attached notice. Backpay, if any, shall be computed with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Order will also require Respondent to furnish the Union with the requested information.

[Recommended Order omitted from publication.]